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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ERMINSUL VILLEGAS, JR.,

Defendant and Appellant.

G046248

(Super. Ct. No. 07WF1931)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed in part, reversed in part and remanded.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant Luis Erminul Villegas, Jr., guilty of shooting at inhabited dwelling house in violation of Penal Code section 246 as charged in count one of the information, and that the shooting was done for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). (All further statutory references are to the Penal Code.) Defendant was also found guilty of violating section 245, subdivision (b), assault with a semiautomatic firearm, as charged in count two, and that it was done within the meaning of section 186.22, subdivision (b)(1). The court sentenced defendant to state prison for a determinate term of six years to be followed by 15 years to life.

In his appeal, defendant argues there was insufficient evidence to support his convictions and that the trial court erred in failing to give a unanimity instruction for count two. The Attorney General agrees the trial court erred in instructing on count two. We agree and reverse defendant's conviction on count two, but affirm his conviction on count one. Even though we reverse defendant's conviction on count two, we do so after concluding substantial evidence supports his conviction on that count.

I

FACTS

The Shooting

Ralph Quinata lives at the corner of Homer and Roxanne Streets in Westminster, across the street from the victims, a Samoan family. Quinata was tucking his daughter in for the night in August 2007 when the daughter became frightened after hearing four gunshots. Quinata testified: "The first shots were right directly — sounded like outside her window, and then they started fading and I could tell the direction was farther away now." He ran outside his house to find out what was happening. The previous evening, the Samoan family had some problems with "some young Latino kids." Quinata dialed 911.

As he was on the phone with the operator, other neighbors “started yelling that the car is coming back.” When the car came into Quinata’s view, he saw a white Honda four-door sedan traveling “maybe five miles an hour, just creeping along,” and that its lights were off. He also saw the car had tinted windows, the passenger window was halfway up and “the person’s arm outside the window and shots fired.” It was a semiautomatic firearm. There were two shots, a pause, and then another shot. What he heard from the car was “almost like laughter.” Quinata later added that he took cover when the second round of shots occurred: “Actually, what happened is, I saw the arm and the gun held up at the same time it was being shot. And then the same instance I could hear my family behind me. So I’m ducking and then looking at them and yelling at them to get inside, so I lost sight of what he was or what the individual was doing.”

A second vehicle followed the first. It was a black full-size Nissan Titan truck. He did not observe anyone firing shots from the second vehicle. Its lights were also out, and “was showing interest in the house and also, I guess, enjoyment or laughter too.”

A Westminster Police Department officer received a call from dispatch regarding a shooting and a vehicle description. Within two to three minutes, he observed a vehicle matching the description, a white Honda, close to the area of the reported shooting traveling at “a high rate of speed . . . between 50 and 60 miles per hour” in an area where the speed limit is 40 miles per hour, followed it and pulled it over. When backup officers arrived, two individuals from the car were found and detained. One was defendant, who was the driver. A handgun, shell casing and meth pipes were found in the car.

Investigators found a bullet hole in a vehicle parked in the front yard on Homer Street, at the address where a Samoan family with five brothers lives. An entry hole was found on the right rear panel of the vehicle. While it was not forensically

tested, a bullet resembling a nine-millimeter bullet was found. Both .22-caliber and nine-millimeter shell casings were found in the street.

The Homeowner

Sami Niutapuui lives on Homer Street in Westminster with his wife and six children, five boys and a girl. He was in bed when he heard shots. It is a single-story home with a gate, and the family has several vehicles.

Niutapuui ran to the living room to check on his children. He said “they were already on the ground.” He told them to turn off the lights. He called the police, who later pointed out a hole in his daughter’s car.

Gang Expert

William Drinnin is a police officer with Westminster Police Department who was assigned to the gang unit in August 2017. He testified the city was faced with big problems concerning two Hispanic gangs, and one of them calls itself West Trece. Within West Trece’s claimed territory is Homer Street.

According to Drinnin, the brothers in the Samoan family on Homer Street do not belong to any gang. He said he is aware of a Samoan gang called USO LUV Crips, but the family on Homer Street has no connection with it.

Drinnin described the problems between the Samoan family and West Trece: “It began with a perceived disrespect that one of the West Trece members interpreted from some of the individuals that live [on] . . . Homer. There was a minor altercation that took place at the — in the front of the residence initially. The West Trece gang member left, went back to Zigler Park which is a common gathering area for other members of West Trece which can be contacted there at any given time. [¶] That gang member went back to that park, rallied up several other West Trece gang members, one of which was Robert Murial and goes by the moniker of Mono. At some point in time

they had obtained a handgun, proceeded back to . . . Homer Street and confronted the individuals at the residence that ended up participating in a shooting.” Drinnin testified a man named Andres Arzola was a passenger in defendant’s car the night of the shooting when another officer stopped the car.

There had been an incident previous to the one just described in which there was another perceived disrespect when members of West Trece thought individuals from Homer Street made a comment they did not like. In that incident, members of West Trece “came back in cars and armed themselves with various different types of weapons ranging from rocks, bricks, sticks, knives, basically anything that they could get their hands on to utilize as a weapon and began to confront the family members in front of the house which left three . . . of the Samoan brothers stabbed.”

Drinnin described how central respect is within the West Trece gang culture. He said if they lose that respect “they have to do something in order to regain the respect that they’ve lost.” He added that “respect is the most important thing” in the gang, and that it “is earned by basically putting in work for the gang which translates into committing crimes.” Drinnin illustrated how respect works in gang culture:

“[P]articipating in a violent crime, a shooting, a stabbing, a violent robbery, or something of that nature where there’s violence or some sort of escalation of violence based on a past disrespect would constitute more respect than, for example, the — doing the graffiti like I just mentioned.”

The expert stated gang members are supposed to provide backup for other members of the group. He explained: “[I]f they fail to do something that is expected of them, getting taxed or being green-lighted means that they are going to be beaten by other members of the gang for failing to do so.”

Regarding the chain of command within West Trece, Drinnin stated: “At the top of the pyramid you would have an individual called the shot caller, somebody that’s in charge of a gang. Usually that consists of one person giving all the orders that is

aware of all the inner workings of the gang. [¶] Falling under him you will have other individuals within the gang who will pass on orders directed from the shot caller out to the rest of the individuals which are oftentimes referred to as ‘soldiers’ or other variations of the term ‘soldiers,’ which basically means that those are the individuals who are actually putting in the work for the gang.”

The prosecutor posed a hypothetical question to Drinnin. The question mirrored the facts in this case, and asked whether “that was done for the benefit, in association, or at the direction of a criminal street gang?” Drinnin responded: “Yes.” He then explained his affirmative response: “Based on the information you gave me in that hypothetical, there is an individual that does in fact belong to the criminal street gang called West Trece, and at least one individual that belongs to the criminal street gang called West Trece, in my opinion this crime was done in association simply by the fact that the individuals that are there are providing some sort of assistance in association to the other individuals that are gang members to commit that crime.” The prosecutor then asked: “Simply by driving while, in theory, the person in the passenger seat who’s seen firing the gun is able to fire the weapon; is that what you’re referring to?” Drinnin answered: “Exactly.”

Interview of Defendant

About five hours after the stop, Drinnin interviewed defendant. Drinnin said defendant is not a member of West Trece, but that two self-admitted members of West Trece are listed as defendant’s friends on defendant’s MySpace page. Also on defendant’s MySpace page is a photograph of him “flashing the hand sign that West Trece often uses.” During the interview, defendant told Drinnin he was aware that Arzola was a member of West Trece. He also said the individuals with whom Arzola associated often went by nicknames or monikers.

Drinnin described what defendant stated about the family on Homer Street: “And he also indicated that he knew that there were individuals on Homer Street that he knew that West Trece didn’t get along with, and even further indicated that he knew or had heard about an incident that had taken place the night prior. [¶] And when asked to elaborate on the individuals on Homer Street and where they lived and whatnot, he described the general area of the house that he thought the rivalry — where the individuals lived at that the rivalry was between, and the general area that he was describing was the area of . . . Homer.”

When defendant was asked where he had been on the evening of the incident, he gave various stories. One was that Arzola borrowed defendant’s car while defendant was in a liquor store. Another was that he and Arzola were traveling a different route than the one they were traveling immediately prior to being stopped. Another was that he and Arzola had been to a party and made no stops after leaving the party. In one version, the two stopped for gas at a 7-Eleven.

At some point, defendant told Drinnin that after leaving a party that night, Arzola told him he needed to go somewhere to meet up with some of his friends to take care of some business. Drinnin related what defendant told him: “He did indicate that he did not want to participate in the fight; and when asked why he didn’t want to participate in the fight, he told me that he had an injury to his arm where he had stitches which at the time the interview was taking place I was able to observe.” Near Hospital Circle in Westminster, defendant said he left his car with Arzola and defendant remained behind. Defendant said he walked toward a mobilehome park and received a phone call from Arzola asking him where he was, and he was picked up at the corner of Hoover and Main. They drove until getting pulled over by the police.

A few hours into the interview, defendant gave another description about the evening. In this account, defendant and Arzola drove to Hospital Circle and “as soon as they pull in, there was a black truck that pulled in behind them with several other

individuals inside the truck.” It was a black Nissan Titan. Drinnin continued describing what defendant said happened next: “Once the truck pulls up, Mr. Arzola exits the car that he and Mr. Villegas were in and goes back, talks to the individuals in the truck, returns a short time later and indicates to Mr. Villegas that they have some business to take care of near Westminster High School and that they were requesting the use of his car.” Defendant said he permitted them to use his car, and they dropped defendant off near a friend’s house. Defendant told Drinnin he regretted letting Arzola and the others use his car.

II

DISCUSSION

Sufficiency of Evidence

Defendant contends the prosecutor presented insufficient evidence that he is guilty of the charged offenses. He argues: “The prosecutor alleged several theories . . . (1) [Defendant] aided and abetted the shooting by driving Mr. Arzola by the Niutapuui home knowing and intending for the shooting to occur, (2) he aided and abetted the shooting by lending his car to Mr. Arzola knowing a shooting was going to occur, and (3) he aided and abetted the shooting by lending his car to Mr. Arzola for the purpose of a gang fight, the natural and probable consequence of which was the shooting. The prosecutor failed to present sufficient evidence of those theories.”

“““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203, 253.) “[R]eview for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Further, the reviewing court “presume[s] in support of the judgment ‘the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 869.)

Count One

“Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building . . . is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year. [¶] As used in this section, ‘inhabited’ means currently being used for dwelling purposes, whether occupied or not.” (§ 246.)

“The parties to crimes are classified as: [¶] 1. Principals; and, [¶] 2. Accessories.” (§ 30.) “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.” (§ 31.)

“Thus, we conclude that the weight of authority and sound law require proof that an aider and abettor act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citation.]” (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Here a car parked on the front lawn was struck with a bullet. A trier of fact could have reasonably concluded that the firearm was aimed at the home. Defendant was stopped speeding away from the area of the shooting a few minutes after the shooting. His car matched the car described by witnesses. He was driving the car without lights. A gun was found in his car. He provided several different accounts of what he did that night. We conclude there is substantial evidence to support the jury's verdict on count one.

Count Two

“Any person who commits an assault upon the person of another with a semiautomatic firearm shall be punished by imprisonment in the state prison for three, six, or nine years.” (§ 245, subd. (b).) “As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty. [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

Defendant states in his brief that the prosecutor relied upon two separate acts to support the assault charged in count two — “the shooting of the 9-mm handgun at the house and the discharge of the .22-caliber handgun into the air.”

The prosecutor argued: “This case and its testimony is one of corroboration. And I think that I can move through this quickly. This is the views from Homer Street. This is from the front door. That's the white Impala that took the 9-millimeter round. And if you're thinking wait a second, how are we possibly going to convict Mr. Villegas for a 9-millimeter round that penetrated that Impala, when even by my prosecutor's own retallying of the evidence, they only had a 22-caliber. Just like that bank robbery example, if you help in the crime, you're good for all the things that happen. Okay. So if you go to a drive-by shooting with another car and both of your

lights are out and you drive by once and you make a U-turn in tandem, you come by and you're firing rounds into the air and the guy from the other truck has a 9-millimeter and shoots at that house, you're good for it. That's the law."

Respondent's brief states: "The evidence revealed two acts, either of which could have been relied upon in support of count 2. The information did not specify which act was the basis for count 2, and the prosecutor did not clearly elect one act. Accordingly, the trial court had a sua sponte duty to instruct the jury according to CALCRIM 3500 that they must unanimously agree on which act supports each count. [Defendant's] conviction on count 2 should be reversed."

Here Quinata ducked for cover when the second round of shots were occurring while he yelled at his family to get inside. Defendant argues, "It would be pure speculation to infer the shooter intended to do anything more with his second and third shots than to scare bystanders by firing into the air especially given that that is the manner in which he fired his first shot and his arm was still pointed in the air after he concluded firing." We reject his argument the jury speculated. The evidence showed a number of neighbors were outside, some ducking for cover. It was dark. Laughing could be heard from inside both vehicles. A trier of fact could have reasonably concluded defendant aided and abetted the shots from a semiautomatic firearm and that they were willfully fired in close range to the neighbors which carried a natural and probable consequence of committing a battery. Even if defendant had not been the driver, as he told Drinnin in a few of his self-serving accounts, under the circumstances here where he was familiar with gang culture and loaned his car so the gang could take care of business, the natural and probable consequence of which was a shooting. (*People v. Medina* (2009) 46 Cal.4th 913, 921-922.)

We conclude substantial evidence supports defendant's conviction on count two. Where a conviction might rest on any of several theories, and at least one of them is

supported by substantial evidence, the conviction will not be overturned for insufficiency of evidence. (*Griffin v. United States* (1991) 502 U.S. 46, 59-60.)

However, the prosecutor offered two possible scenarios regarding the commission of count two, and did not clarify which was being relied upon by the prosecution. One possibility is that count two occurred the first time the cars circled the block, when the shots were heard but not seen. The second possibility was when the second time the cars circled the block when one of the shots was both heard and seen and the rest of the shots were just heard. The information does not provide a specific description of the act relied upon to support the charge. The parties agree the court did not give the jury a unanimity instruction, and the record before us does not show otherwise. Under these circumstances, despite our finding there is substantial evidence to support defendant's conviction on count two, we must reverse because we cannot ascertain whether or not the jurors agreed regarding the act committed when they found him guilty.

III

DISPOSITION

The judgment is affirmed on count one and reversed on count two. The matter is remanded to the trial court for further proceeding consistent with this opinion.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.